

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWIONE R. WILSON,

Defendant-Appellant.

UNPUBLISHED

November 30, 2001

No. 223008

Wayne Circuit Court

LC No. 99-003829

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Defendant was charged with first-degree felony murder, MCL 750.316(1)(b), and unarmed robbery, MCL 750.530. A jury found him guilty of the lesser offense of assault with intent to do great bodily harm less than murder, MCL 750.84, and not guilty of unarmed robbery. Defendant was sentenced to 4 to 10 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's first claim on appeal is that the trial court erred when it denied defendant's motion to quash the bindover on the charge of felony murder where there was no evidence that defendant intended to commit the underlying felony, nor was there evidence of aiding and abetting. We review allegations of error at the preliminary examination stage under the harmless error standard. *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990)

Here, defendant's argument lacks merit because his claim of insufficient evidence at the preliminary examination stage is included in the challenge to his convictions. *People v Dilling*, 222 Mich App 44, 51; 564 NW2d 56 (1997). Further, where a defendant argues that there was insufficient evidence to bind him over on a charge and the defendant is convicted of a lesser offense at trial, the error is considered harmless. See *People v Moorer*, 246 Mich App 680, 682; ___ NW2d ___ (2001).

In the instant case, defendant was charged with first-degree felony murder, but the jury convicted defendant of the lesser offense of assault with intent to do great bodily harm less than murder. Defendant does not dispute that his conviction of the lesser offense was supported by the evidence. Therefore, as in *Moorer, supra*, any error in the sufficiency of the proofs at the preliminary examination is considered harmless.

Defendant also claims that the trial court committed error when it denied his motion for a directed verdict on the felony murder charge at the close of the people's proofs where there was insufficient evidence produced in the people's case in chief to sustain a conviction beyond a reasonable doubt. We disagree.

In *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998), our Supreme Court stated that "a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to the jury, as long as he is convicted of a charge that was properly submitted to the jury." Further, in *Moorer*, *supra*, we held that any error arising from the submission of a first-degree murder charge to the jury is rendered harmless when the jury acquits the defendant of that charge. *Id.* at 682-683.

Here, defendant does not dispute that the charge of which he was convicted (assault with intent to do great bodily harm less than murder) was properly submitted to the jury. Therefore, any error arising from the submission of the first-degree felony murder charge to the jury was rendered harmless when the jury acquitted defendant of that charge, and the trial court properly denied defendant's motion for directed verdict.

Defendant next argues that he is entitled to an order of acquittal or a new trial where the prosecutor engaged in prosecutorial misconduct. We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant does not cite the record and indicate specifically which of the prosecutor's comments amounted to misconduct.¹ Defendant may not merely announce his position and leave it to us to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Even if we were to review this issue, we would conclude that defendant's argument is without merit. Prosecutorial comments must be "evaluated in light of defense arguments." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). "An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Here, the only comments in the record that relate to defendant's argument are in the prosecution's rebuttal to defendant's closing argument. After evaluating the prosecutor's comments in context, we conclude that the remarks were either in response to arguments raised by the defendant, or were reasonable inferences from the evidence presented at trial. *Schutte*, *supra*. Further, any misconduct of the prosecutor was cured when the trial court instructed the jury that the statements of attorneys are not evidence. *Id.* at 721-722.

¹ Defendant's only citation to the record is where he indicates that he objected to the prosecutor's comments following closing arguments, rebuttal, and jury instructions.

We also reject defendant's argument that he was denied a fair trial by the cumulative effect of the prosecutor's comments because none of the individual comments amounted to misconduct. *Watson, supra* at 594.

Defendant next argues that the trial court committed error in sentencing him when it scored offense variable two (OV 2) at 100 points. Defendant claims that the proper score should have been zero. Appellate review of scoring decisions is limited, and we affirm a scoring decision if evidence exists to support the score. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994).

The Supreme Court's sentencing guidelines apply to offenses committed before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Defendant's crime was committed on May 16, 1998; therefore, the Supreme Court's guidelines apply.

Under the guidelines, OV 2 addresses scoring for an assault that involves a "Physical Attack and/or Injury." The instructions to OV 2 direct the trial court as follows:

- A. In multiple offender cases when one offender is assessed points for physical attack and/or injury, all offenders shall be assessed the same number of points.
- B. Score "100" when death results from the commission of a crime and homicide is not the conviction offense.

Here, the trial court found either A or B applied in this case because another person involved in the crime was assessed a hundred points on OV 2, and because defendant was not convicted of a homicide and but death resulted.

We agree with the trial court. The evidence at trial established that there were several people, including defendant, involved in the beating of the victim. Further, it was undisputed that another one of the victim's attackers was assessed 100 points for OV 2. Therefore, the trial court properly scored 100 points for this offense variable.

Defendant's final argument is that his sentence was disproportionately severe considering the circumstances surrounding the offense and the offender. We review sentencing determinations for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). A sentencing court abuses its discretion when it violates the principle of proportionality which requires a sentence to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Here, defendant's sentencing guidelines score resulted in a sentence range of 12 to 48 months (1 to 4 years). Defendant was sentenced to a minimum term of four years' imprisonment. A sentence within the guidelines is presumptively proportionate. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). Defendant offered no persuasive evidence of unusual circumstances that would overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Therefore, defendant's sentence

was proportionate to the seriousness of the offense and the offender, and the trial court did not abuse its discretion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen